STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263700 Oakland Circuit Court
CLEVE VINCE BROWN, Defendant-Appellant.	LC No. 2005-201156-FH

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 20 to 50 years for the cocaine conviction, 10 to 30 years for the heroin conviction, and 2 to 15 years for the marijuana conviction. He appeals as of right. We affirm.

I. Underlying Facts

On the morning of December 23, 2004, Pontiac police officers executed a search warrant at a condominium located on Brandon Street in Pontiac. The condominium, which was government-assisted "low-income" housing, was leased to codefendant Angelina Gomez. At the time of the raid, defendant and Gomez were asleep in the master bedroom, and defendant and Gomez's two children were in different bedrooms. In the master bedroom, the police found a box of plastic sandwich bags, $2,500, a man's headscarf, and an expensive man's watch on top of a bedroom dresser, and an additional $900 in a dresser drawer. Behind a nightstand, the police found a black plastic bag inside a green and white plastic bag. The black plastic bag contained two bags of cocaine, heroin, seven one-ounce bags of marijuana, and two digital scales. One ounce of marijuana was found in a tall dresser, which also contained men's clothing. Defendant's jeans, which were on the bedroom floor, contained approximately $2,300 and defendant's Michigan identification card, listing an address of 131 Willard Street in Pontiac. A coffee grinder containing cocaine residue was found in a kitchen cupboard above the refrigerator, along with a box of plastic sandwich bags. In a patio closet, the police found a bulletproof vest. In response to a police inquiry for keys to a Chevrolet Impala parked in the garage, defendant allegedly directed the police to a man's coat in the dining room. In the coat, the police found

keys for the condominium and the Impala, $170, a large plastic bag containing cocaine, and three corner-tie packs of heroin. According to police testimony, the condominium also contained many expensive items and high-end electronics, including hardwood tables, leather furnishings, jewelry, two big-screen televisions, and audio and digital equipment. A Dodge Durango registered to defendant at the Willard Street address, a conversion van, and a rental vehicle were also at the residence.

The police found both male and female clothing and documents for defendant and Gomez in the master bedroom, as well as photographs of defendant and Gomez throughout the residence. On the nightstand in the bedroom, the police found a temporary license for defendant listing the Willard Street address. In the nightstand was paperwork and a checkbook for a joint bank account held by defendant and Gomez,[1] documents from the Family Independence Agency involving defendant, a rental property lease agreement for the condominium listing Gomez as the tenant, a government Section VIII housing assistance payments contract for Gomez, and a November 2004 verification of Gomez's intent to vacate 131 Willard Street from the Pontiac Housing Commission. The police also found a pay stub for defendant in the bedroom; the stub showed year-to-date (through December 2004) earnings of $2,200. No documents for any other adult were found.

At trial, defendant denied living in the condominium and indicated that he had lived at 131 Willard Street for the past 16 or 17 months. Defendant claimed that he was at the condominium during the raid because he had taken their son to a sports game on the previous night, and when he brought the child home, "one thing led to another, and [he and Gomez] ended up sleeping together." Defendant denied ownership of the drugs found in the condominium, the coat in which drugs were found, or the Impala. He admitted ownership of the money in his jeans, explaining that he had saved it. Defendant claimed that Gomez "was messing around with other guys," and "[he] would assume somebody would have access [to the condominium]."

II. Sufficiency of the Evidence

Defendant first argues that the prosecution presented insufficient evidence to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant does not challenge the individual elements of the offenses, MCL 333.7401(2)(a)(*iii*) and (*iv*), and MCL 333.7401(2)(d)(*iii*).[2] He only argues that there was

[1] When the police began forfeiture proceedings, the bank account had a balance of $12,000.

[2] MCL 333.7401 provides:

(continued…)

insufficient evidence that he possessed the controlled substances. Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe*, *supra* at 519-520. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). "[C]ircumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

At trial, the prosecutor argued that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39.

> To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. [*People v*

(…continued)

> (1) [A] person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .
>
> (2) A person who violates this section as to:
>
> > (a) [Heroin or cocaine]:
> >
> > * * *
> >
> > > (*iii*) Which is in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance is guilty of a felony . . . .
> > >
> > > (*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony . . . .
> >
> > * * *
> >
> > (d) Marihuana or a mixture containing marihuana is guilty of a felony punishable as follows:
> >
> > * * *
> >
> > > (*iii*) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years . . . .

Izarraras-Placante, 246 Mich App 490, 495-496; 633 NW2d 18 (2001), quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime. . . ." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999), quoting *Turner*, *supra* at 568. "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal and the defendant's participation in planning or executing the crime. *Carines*, *supra* at 757-758, quoting *Turner*, *supra* at 568-569. But "a person's presence, by itself, at a location where drugs are found is insufficient to prove constructive possession." *Wolfe*, *supra* at 520.

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude beyond a reasonable doubt that defendant either possessed the drugs or assisted Gomez in possessing the drugs. The evidence showed that, at the time of the raid, defendant was asleep in the master bedroom where a large amount of drugs and cash were found. The police found a bag containing cocaine, heroin, marijuana, and two digital scales behind a nightstand that contained personal documents belonging to defendant. Defendant's temporary license was on top of that nightstand. One ounce of marijuana was found in a tall dresser that contained men's clothing. Defendant's jeans, which were on the floor, contained approximately $2,300. On top of a dresser, in plain view, was a box of plastic sandwich bags, $2,500, a man's headscarf, and an expensive man's watch, and an additional $900 was in a dresser drawer. In a coat in the dining room, the police found $170, a large plastic bag containing cocaine, and three corner-tie packs of heroin. The drugs found in the coat were packaged consistently with the drugs found in the master bedroom.

Although Gomez was listed as the tenant of the condominium, the evidence supported an inference that defendant had sufficient dominion over the drugs found there. As previously indicated, defendant was asleep in a bed with Gomez at the time of the raid. Both male and female clothing were in the master bedroom, and photographs of defendant and Gomez were throughout the residence. Defendant and Gomez's children (ages five and nine) were also in the condominium. Defendant directed the police to the coat in the dining room in which the police found keys for the condominium and for a car that was parked in the garage. Numerous personal documents for defendant were in a nightstand in the master bedroom. Although defendant's documents showed a Willard Street address, there was also documentation showing Gomez's former residence as that same address. Also, among the documents was paperwork showing that defendant and Gomez had a joint bank account with a balance of approximately $12,000. Moreover, there were high-end electronics, expensive furnishings, and large amounts of cash throughout the condominium, which was inconsistent with defendant's low-paying job and Gomez's receipt of public assistance. Defendant admitted ownership of the $2,300 found in his jeans and claimed that he had saved the money, but a pay stub showed defendant's year-to-date earnings (through December 2004) as $2,200. From this evidence, a jury could reasonably infer that defendant possessed the drugs found in the condominium.

The evidence was also sufficient to permit a rational trier of fact to reasonably infer that defendant intended to deliver the drugs. Actual physical delivery of drugs is not necessary to

prove that a defendant intended to deliver the controlled substance. *Wolfe*, *supra* at 524. Rather, intent to deliver may be inferred from "the quantity of narcotics in a defendant's possession, from the way in which those narcotics are packaged, and from other circumstances surrounding the arrest." *Id.* Officer Daniel Main, who was qualified as an expert in the field of drug trafficking, testified that, given the quantity of drugs, the lack of drug paraphernalia, and other factors, including the digital scales, the plastic bags, the packaging, the use of the coffee grinder, and the amounts of cash, the controlled substances at issue were not consistent with personal use, but were intended for sale or delivery. The evidence was sufficient to sustain defendant's convictions.

III. Prior Conviction

Any error in allowing the prosecutor to impeach defendant's credibility with evidence of a prior conviction for third-degree home invasion, MCL 750.110a(4), was harmless. "The erroneous admission of evidence of a prior conviction is harmless error where reasonable jurors would find the defendant guilty beyond a reasonable doubt even if evidence of the prior conviction had been suppressed." *People v Coleman*, 210 Mich App 1, 7; 532 NW2d 885 (1995). See also *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative). The evidence of defendant's prior conviction for third-degree home invasion was of comparatively minor importance considering the totality of the admissible evidence against him. Defendant has not established that the alleged error was outcome-determinative, and, thus, reversal is not warranted on this basis.

IV. Effective Assistance of Counsel

Defendant, who was tried jointly with codefendant Gomez, argues that defense counsel was ineffective for failing to move for severance. We disagree. Because defendant failed to raise this ineffective assistance of counsel issue in a motion for a new trial or an evidentiary hearing before the trial court, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Severance is mandated under MCR 6.121(C) only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 345; 524 NW2d 682 (1994). To make this demonstration, a defendant must provide the court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that his substantial

rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Id.* at 346. Mere inconsistency of defenses is not enough to require severance; the defenses must be mutually exclusive or irreconcilable. *Id*. at 349. "Incidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice. The 'tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other.'" *Id.* (citations omitted). Also, "finger pointing" is not a sufficient reason to grant separate trials. *Id*. at 360-361. In sum, severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id*. at 359-360, quoting *Zafrio v United States*, 506 US 534, 539;113 S Ct 933; 122 L Ed 2d 317 (1993).

Defendant and Angelina Gomez's joint trial involved several witnesses and substantially identical evidence. To hold separate trials in these substantially identical cases would have been unnecessarily duplicative and excessive. The interests of justice, judicial economy, and orderly administration favored a joint trial. Further, defendant has not provided concrete facts or reasons to justify separate trials, and has not persuasively demonstrated that his substantial rights were prejudiced by a joint trial. The record does not show "significant indication" that the requisite prejudice in fact occurred at trial. *Hana*, *supra* at 346-347. Further, the jury was not required to believe one defendant at the expense of the other and, in fact, it did not. Defendant and Gomez were each convicted of the charged offenses. Moreover, where, as here, the prosecutor advances a theory of aiding and abetting against both defendants, "[f]inger pointing by the defendants . . . does not create mutually exclusive antagonistic defenses." *Id*. at 360-361. Rather, because an aider and abettor can also be held liable as a principal, both defendants can be convicted "without any prejudice or inconsistency." *Id*. at 361.

Finally, the risk of prejudice from a joint trial may be allayed by a proper cautionary instruction. *Id.* at 351, 356. The trial court instructed the jurors concerning reasonable doubt and the determination of guilt or innocence on an individual basis, and cautioned the jury that each case must be considered and decided separately and on the evidence as it applied to each defendant. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Because defendant has failed to show that he was entitled to severance, he has likewise failed to establish that he was prejudiced by defense counsel's failure to move for severance. *Effinger*, *supra* at 69. Consequently, defendant is not entitled to a new trial on this basis.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra